## Datuk Seri Anwar bin Ibrahim v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–19–01 OF 2012
AZIAH ALI, ROHANA YUSOF AND ZAWAWI SALLEH JJCA
20 DECEMBER 2013

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*Criminal Procedure — Prosecution — Deputy public prosecutor — Disqualification — Application to disqualify advocate and solicitor from being appointed as deputy public prosecutor to conduct appeal — Principles applicable in disqualifying counsel — Whether applicant's rights to fair trial and equal treatment under arts 5 and 8 of the Federal Constitution prejudiced — Whether appointment in breach of r 28(c) of the Legal Profession (Practice and Etiquette) Rules 1978*

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*Evidence — Documentary evidence — Statutory declaration — Statutory declaration referred to in body of applicant's affidavit — Maker of statutory declaration not available for cross-examination — Whether contents of statutory declaration hearsay — Name and address of maker 'blotted' — Discrepancies in NRIC number — Whether statutory declaration inadmissible*

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*Legal Profession — Advocates and solicitors — Disqualification — Application to disqualify advocate and solicitor from being appointed as deputy public prosecutor to conduct appeal — Principles applicable in disqualifying counsel — Whether applicant's rights to a fair trial and equal treatment before law under arts 5 and 8 of the Federal Constitution prejudiced — Whether appointment in breach of r 28(c) of the Legal Profession (Practice and Etiquette) Rules 1978*

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Enclosure 48a was the second application by the applicant to disqualify Tan Sri Muhammad Shafee bin Md Abdullah ('Shafee') from leading the prosecution team in their appeal against the applicant's acquittal on a sodomy charge. The applicant's affidavit in support of his application was anchored on the facts found in the statutory declaration ('SD') made by one Mat Zain bin Ibrahim ('Mat Zain'). Based on the allegations of Mat Zain, the applicant contended that Shafee was not a fit and proper person to be appointed as deputy public prosecutor ('DPP') to conduct the appeal as Shafee would not be able to prosecute the appeal independently, fairly, impartially without being actuated by personal motive. The applicant claimed that this would prejudice the applicant's rights to a fair trial and equal treatment before the law as enshrined in arts 5 and 8 of the Federal Constitution. The applicant also took an objection to Shafee arguing in opposition to the application on the ground that Shafee had affirmed affidavits as to disputed facts and therefore Shafee would

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be in breach of r 28(c) of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). In response Shafee submitted that in the first application the same objection had been raised by the applicant which was overruled by the Court of Appeal.

**Held**, dismissing the application:

(1) An application to disqualify a counsel ought to be considered in light of the principle that courts should not lightly interrupt the relationship between a lawyer and a client. The court should hesitate to order disqualification except where absolutely necessary and for good reasons. A disqualification may be ordered only if the court determines that a lawyer's continued participation as counsel taints the judicial system. The applicant bears the burden to establish with specificity a violation of one or more of the Rules, and mere allegation of unethical conduct or evidence showing a remote possibility of violation of the Rules will not suffice (see paras 6–8).

(2) The allegation of fact to disqualify a counsel must be substantially related to the present proceedings. The allegations in the SD bore no relevance to the facts of the present case as they mainly related to the 'black eye' incident which had been concluded in other earlier proceedings (see para 14).

(3) Mat Zain had not deposed any affidavit for the purpose of this application. The SD was referred to only in the body of the applicant's affidavit. The contents of the SD was hearsay evidence for the reason that the maker of the SD was not available for cross-examination to enable the court to determine the truth or otherwise of the serious allegations levelled at the persons mentioned in the SD (see para 15).

(4) There were latent defects in the SD. Firstly, the name and address on the SD had been 'blotted'. Secondly, there were discrepancies in his NRIC numbers when compared to his other documents. Hence, the SD could not be admitted as evidence which consequently rendered the application unsupported by cogent and credible evidence (see para 16).

(5) The prosecution of the appeal by Shafee would undoubtedly rest solely on the appeal records prepared by the court. There was no possibility that any evidence favourable to the applicant will be concealed or withheld from the court. Further, Shafee was not the sole DPP appearing for the public prosecutor in the appeal. Hence, it was inconceivable to suggest that the mere appointment of Shafee to conduct the appeal would deprive the applicant's right to a fair trial (see para 18).

(6) The applicant had ample opportunity to raise these very issues in the first application instead of raising them by way of instalments. The doctrine of res judicata, issue estoppels thus applied (see para 19).

(7) No compelling and cogent evidence had been adduced to show that the public prosecutor had abused the power conferred upon him to appoint Shafee to conduct the prosecution of the appeal. Under s 114(e) of the Evidence Act 1950 the court is entitled to presume that official acts have been regularly performed in the absence of evidence of mala fide or malice (see para 20).

**[Bahasa Malaysia summary**

Lampiran 48a adalah pemohonan kedua oleh pemohon untuk menyingkir Tan Sri Muhammad Shafee bin Md Abdullah ('Shafee') daripada mengetuai pasukan pendakwaan dalam rayuan mereka terhadap pembebasan pemohon untuk pertuduhan liwat. Afidavit sokongan pemohon untuk pemohonannya berasaskan fakta yang didapati dalam deklarasi statutori ('DS') yang dibuat oleh Mat Zain bin Ibrahim ('Mat Zain'). Berdasarkan dakwaan Mat Zain, pemohon berhujah bahawa Shafee bukan seorang yang sesuai atau wajar untuk dilantik sebagai timbalan pendakwa raya ('TPR') untuk mengendalikan rayuan itu kerana Shafee tidak akan dapat mendakwa rayuan itu secara bebas, adil, saksama tanpa didorong oleh motif peribadi. Pemohon mendakwa bahawa ini akan menjejaskan hak pemohon untuk perbicaraan yang adil dan layanan yang sama di sisi undang-undang yang termaktub dalam perkara-perkara 5 dan 8 Perlembagaan Persekutuan. Pemohon juga membantah terhadap Shafee yang berhujah menentang pemohonan itu atas alasan bahawa Shafee telah mengesahkan afidavit bagi fakta yang dipertikaikan dan oleh itu Shafee melanggar peraturan 28(c) Peraturan-Peraturan Profesion Undang-Undang (Amalan dan Etika) 1978 ('Peraturan-Peraturan'). Sebagai jawapan Shafee berhujah bahawa dalam permohonan pertama itu bantahan yang sama telah ditimbulkan oleh pemohon yang telah ditolak oleh Mahkamah Rayuan.

**Diputuskan**, menolak permohonan:

(1) Suatu permohonan untuk membatalkan pelantikan peguam patut dipertimbangkan berdasarkan prinsip bahawa mahkamah tidak patut sewenang-wenangnya mengganggu hubungan antara peguam dan anak guam. Mahkamah patut keberatan untuk memerintahkan pembatalan kelayakan kecuali jika benar-benar perlu dan atas sebab-sebab yang kukuh. Pembatalan kelayakan boleh diperintahkan hanya jika mahkamah menentukan bahawa penglibatan berterusan seorang peguam sebagai peguam akan menjejaskan sistem kehakiman. Pemohon mempunyai beban untuk membuktikan berlaku pelanggaran khusus terhadap satu atau lebih daripada Peraturan itu, dan dakwaan semata-mata berhubung perlakuan yang tidak beretika atau bukti yang menunjukkan kemungkinan kecil berlaku pelanggaran Peraturan-Peraturan itu adalah tidak memadai (lihat perenggan 6-8).

(2) Dakwaan fakta untuk membatalkan peguam mestilah berkaitan dengan

prosiding ini. Dakwaan dalam DS tidak relevan kepada fakta kes ini terutamanya berkaitan dengan kejadian 'mata hitam' yang telah dibuat kesimpulan dalam prosiding sebelumnya (lihat perenggan 14).

(3) Mat Zain tidak mendeposkan apa-apa afidavit bagi tujuan permohonan ini. DS itu dirujuk hanya dalam afidavit pemohon. Kandungan DS adalah dengar cakap dengan alasan bahawa pembuat DS itu tiada untuk pemeriksaan balas bagi membolehkan mahkamah menentukan kebenaran atau sebaliknya dakwaan serius yang dilontarkan kepada orang yang disebut dalam DS itu (lihat perenggan 15).

(4) Terdapat kecacatan dalam DS itu. Pertama, nama dan alamat pada DS itu telah 'blotted'. Kedua, terdapat percanggahan dalam nombor kad pengenalannya berbanding dengan dokumen yang lain. Oleh itu, DS itu tidak boleh diterima sebagai keterangan yang seterusnya menyebabkan permohonan itu tidak disokong dengan bukti yang meyakinkan dan boleh dipercayai (lihat perenggan 16).

(5) Pendakwaan rayuan oleh Shafee sudah pasti bergantung semata-mata kepada rekod rayuan yang disediakan oleh mahkamah. Tiada kemungkinan bahawa apa-apa keterangan yang berpihak kepada pemohon akan disembunyikan atau dirahsiakan daripada mahkamah. Selanjutnya, Shafee bukanlah satu-satunya TPR yang hadir bagi pihak pendakwa raya dalam rayuan itu. Oleh itu, ia adalah mustahil untuk mencadangkan bahawa pelantikan Shafee semata-mata untuk mengendalikan rayuan itu akan menafikan hak pemohon terhadap perbicaraan yang adil (lihat perenggan 18).

(6) Pemohon mempunyai banyak peluang untuk menimbulkan isu-isu tersebut dalam permohonan pertama dan bukan menimbulkannya secara berperingkat. Doktrin res judicata, isu estopel dengan itu adalah terpakai (lihat perenggan 19).

(7) Tiada keterangan yang menarik dan meyakinkan telah dikemukakan untuk menunjukkan bahawa pendakwa raya telah menyalahguna kuasa yang diberikan kepadanya untuk melantik Shafee bagi mengendalikan pendakwaan rayuan itu. Di bawah s 114(e) Akta Keterangan 1950 mahkamah berhak menganggap bahawa tindakan-tindakan rasmi itu telah dilaksanakan mengikut aturan jika tiada bukti mala fide atau niat jahat (lihat perenggan 20).]

**Cases referred to**

*Ahmadi bin Yahya v PP* [2012] 6 MLJ 37, CA (refd)
*Chew Gim Ser v PP* [2005] 1 SLR 201, HC (refd)
*Earles Utilities Limited v Jacob* (1934) Vol L1 TLR 43 (refd)
*Harun bin Abdullah v PP* [2009] 3 MLJ 337, CA (refd)
*Joseph Puspam v Menteri Sumber Manusia & Anor* [2001] 4 CLJ 252, CA (refd)

*Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, HC (refd)
*Marneedi Satyam v Masimukkula Venkataswami* [1949] AIR Mad 689 (refd)
*Mayban Assurance Bhd lwn Sufian Mohd Said* [1998] 6 MLJ 170, HC (refd)
*PP v Foster Frank Edald Heinrich* [1988] 2 MLJ 594, HC (refd)
*PP v Lee Siew Ngock* [1966] 1 MLJ 225, HC (refd)
*Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49, CA (refd)
*Shamugam v Pappah* [1994] 1 MLJ 144, HC (refd)

**Legislation referred to**
Evidence Act 1950 s 114(e)
Federal Constitution arts 5, 8
Legal Profession (Practice and Etiquette) Rules 1978 r 28(c)

**Appeal from:** Criminal Trial No 45–9 of 2009 (High Court, Kuala Lumpur)

*Tommy Thomas (Afiq Mohd Noor with him) (Karpal Singh) for the applicant.*
*Muhammad Shafee bin Abdullah (Mohamad Hanafiah bin Zakaria and Noorin bt Badaruddin with him) (Attorney General's Chambers) for the respondent.*

**Aziah Ali JCA (delivering judgment of the court):**

ENCLOSURE 48A

**[1]** Enclosure 48a is the second application by the applicant, Datuk Seri Anwar bin Ibrahim to disqualify Tan Sri Muhammad Shafee bin Md Abdullah ('Shafee') from leading the prosecution team in their appeal against the applicant's acquittal on a sodomy charge.

**[2]** In support of his application, the applicant filed the following affidavits:

(a) affidavit in support of the applicant dated 5 December 2013;

(b) additional affidavit of Mohd Radzlan bin Jalaludin dated 10 December 2013, and

(c) second affidavit of the applicant dated 16 December 2013.

**[3]** In response to the applicant's affidavits, the respondent filed the following affidavits:

(a) affidavit of Shafee dated 10 December 2013;

(b) affidavit in reply (2) of Ramli bin Yusuff dated 10 December 2013;

(c) corrective affidavit to affidavit in reply (2) of Ramli bin Yusuff dated 11 December 2023;

A (d) affidavit in reply to additional affidavit of Noorin bt Badaruddin dated 16 December 2013, and

(e) affidavit in reply 2 to the applicant's second affidavit of Shafee dated 18 December 2013.

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**[4]** At the outset of the hearing of this application, learned counsel for the applicant, Encik Tommy Thomas, has taken an objection to Shafee arguing in opposition to the application on the ground that Shafee had affirmed affidavits as to disputed facts and therefore Shafee would be in breach of r 28(c) of the
C Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules') which states as follows:

> (c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

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**[5]** In response Shafee submits that in the first application the same objection had been raised by counsel for the applicant which was overruled by the Court of Appeal which had subsequently been brought as an appeal to the Federal Court wherein Shafee continued to prosecute.

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**[6]** In the circumstances we see no reason to depart from the position taken by the Court of Appeal in the first application in respect of Shafee arguing this application. The objection is therefore overruled. This is to preserve the integrity of the judicial system and to prevent inconsistent decisions of the
F court.

**[7]** Before we embark upon the task of considering the merits or otherwise of this application, it is opportune for us to state the approach to be adopted in
G considering an application to disqualify a counsel. An application to disqualify a counsel ought to be considered in light of the principle that courts should not lightly interrupt the relationship between a lawyer and a client. The court should hesitate to order disqualification except where absolutely necessary and for good reasons. A disqualification may be ordered only if the court
H determines that a lawyer's continued participation as counsel taints the judicial system.

**[8]** The applicant bears the burden to establish with specificity a violation of one or more of the Rules, and mere allegation of unethical conduct or evidence
I showing a remote possibility of violation of the Rules will not suffice.

**[9]** We have read all the affidavits filed by the applicant carefully and meticulously. We discern that the applicant's affidavit in support of his application (encl 48b) is anchored on the facts found in the statutory

declaration ('SD') made by one Datuk Mat Zain bin Ibrahim ('Mat Zain') dated 7 October 2013 (exh A1) which the applicant avers was brought to his attention on 2 December 2013 (para 7 of encl 48b).

**[10]** To put the matter in its correct perspective, it is apposite to reproduce below the facts found in the SD as averred by the applicant in para 9 of his affidavit in support (encl 48b) as follows:

(a) that Shafee knew of Gani's action in deliberately suppressing important evidence in the Pulau Batu Putih hearing at the International Court of Justice in 2007 that caused Malaysia to lose Pulau Batu Putih to Singapore;

(b) that Shafee told Mat Zain that 'you will not believe your eyes if you were to see the amount of cash that was transferred into Gani's account in Hong Kong';

(c) that Shafee agreed with Mat Zain that Gani had fabricated evidence against the applicant during the 'black eye' investigation;

(d) that Shafee agreed it was indeed true that Dr Abdul Rahman bin Yusof a forensic consultant at Kuala Lumpur Hospital had fabricated evidence in the applicant's 'black eye' investigation; and

(e) that Shafee was also of the view that the three member panel chaired by Federal Court Judge Abd Kadir Sulaiman and Court of Appeal Judges Mohd Noor Abdullah and Mohd Noor Ahmad who had in 2009 in a majority decision cleared Gani and former IGP Musa Hassan of allegations of tampering with the applicant's blood sample was in fact an unconstitutional sitting.

**[11]** Relying heavily on the above allegations by Mat Zain, the applicant contends that Shafee is not a fit and proper person to be appointed as deputy public prosecutor ('DPP') to conduct the appeal as Shafee would not be able to prosecute the appeal independently, fairly, impartially without being actuated by personal motive. Accordingly this would prejudice the rights of the applicant to a fair trial and equal treatment before the law as enshrined in arts 5 and 8 of the Federal Constitution.

**[12]** In reply, the main thrust of Shafee's submissions in objecting to the application is this: that the SD is hearsay and contains frivolous allegations which cannot be relied upon to prove the allegations contained therein for the reason that the maker of the SD, Mat Zain, is not available for cross-examination and he has not deposed any affidavit and neither is he a party in this proceedings.

**[13]** Having perused the cause papers and all affidavits filed herein and

having heard submissions of both parties at length, we are of the considered opinion that the determining issue that will dispose of this application is simply this: whether the SD is admissible evidence to support the application encl 48a?

**[14]** It is trite that the allegation of fact to disqualify a counsel must be substantially related to the present proceedings. On our plain reading of the SD we find that the allegations in the SD bear no relevance to the facts of the present case as they mainly relate to the 'black eye' incident which has been concluded in other earlier proceedings.

**[15]** It is pertinent to note that Mat Zain has not deposed any affidavit for the purpose of this application. The SD was referred to only in the body of the applicant's affidavit. We are in agreement with the submissions of Shafee that the contents of the SD is hearsay evidence for the reason that the maker of the SD is not available for cross-examination to enable this court to determine the truth or otherwise of the serious allegations levelled at the persons mentioned in the SD (see *Mayban Assurance Bhd lwn Sufian Mohd Said* [1998] 6 MLJ 170); *Ratanlal and Dhirajlal's Law of Evidence* (22nd Ed) 2006; *Earles Utilities Limited v Jacob* (1934) Vol L1 TLR 43; *Marneedi Satyam v Masimukkula Venkataswami* [1949] AIR Mad 689; *Public Prosecutor v Foster Frank Edald Heinrich* [1988] 2 MLJ 594); *Shamugam v Pappah* [1994] 1 MLJ 144; *Chew Gim Ser v Public Prosecutor* [2005] 1 SLR 201).

**[16]** Further, we note that there are latent defects in the SD in view of the uncontroverted evidence that there are discrepancies in the identity of the maker of the SD, Mat Zain. We say so because firstly, the name and address on the SD in exh A1 had been 'blotted'. There is no conceivable reason why Mat Zain refuses to disclose particulars of his identity and his address in the SD if he stands by his allegations, when in the defamation suit that he had filed against the applicant at the Shah Alam High Court, he had disclosed his identity and address. Secondly, we find there are discrepancies in his NRIC numbers when compared to his other documents such as the search report from the Insolvency Department and his cause papers in the defamation action against the applicant at the Shah Alam High Court in Suit No MT1–22–1386 of 2008. For these reasons, we are of the firm opinion that the SD cannot be admitted as evidence which consequently render this application unsupported by cogent and credible evidence. It follows, therefore, that the other grounds raised by the applicant which are grounded on the same impugned SD cannot be sustained. For this reason alone this application ought to be dismissed *in limine*.

**[17]** That notwithstanding, for completeness we will deal briefly with the other grounds raised by the applicant in the following paragraphs.

**[18]** The applicant contends that the appointment of Shafee is in breach of arts 5 and 8 of the Federal Constitution. With respect, we are unable to agree. We are unable to appreciate how the appointment of Shafee will deprive the applicant of a fair trial because the prosecution of the appeal by Shafee will undoubtedly rest solely on the appeal records prepared by the court. There is no possibility that any evidence favourable to the applicant will be concealed or withheld from the court. Further, it is pertinent to note that Shafee is not the sole DPP appearing for the public prosecutor in the appeal. On record, there are with Shafee two senior DPPs from the Attorney General's Chambers in the persons of Dato Mohamad Hanafiah bin Zakaria and Puan Noorin bt Badaruddin who were part of the prosecution team in the court below. It is trite that the role and function of a DPP as well as defence counsel is to assist the court in reaching its decision. Indeed the final decision of the appeal is with the court. In making its decision the court will examine and scrutinise the entire appeal records. With respect, it is therefore inconceivable to suggest that the mere appointment of Shafee to conduct the appeal will deprive the applicant's right to a fair trial.

**[19]** Having given our anxious consideration to the other grounds raised by the applicant, we find no merit in each of them. These are issues of law which counsel ought to have raised in the applicant's earlier application. The applicant has had ample opportunity to raise these very issues in the first application instead of raising them by way of instalments. We agree that the doctrine of res judicata, issue estoppels apply (see *Public Prosecutor v Lee Siew Ngock* [1966] 1 MLJ 225; *Harun bin Abdullah v Public Prosecutor* [2009] 3 MLJ 337; *Ahmadi bin Yahya v Public Prosecutor* [2012] 6 MLJ 37 and *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239).

**[20]** As regard the contention of a breach of art 8, we are of the view that no compelling and cogent evidence has been adduced before us to show that the Public Prosecutor has abused the power conferred upon him to appoint Shafee to conduct the prosecution of the appeal. Under s 114(e) of the Evidence Act 1950 the court is entitled to presume that official acts have been regularly performed in the absence of evidence of mala fide or malice (see *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49). Therefore we find that there is no other finding that this court can make but to hold that the appointment of Shafee is in accordance with the law.

**[21]** It is further contended by the applicant that the public prosecutor is obliged to proffer reasons for the appointment of Shafee. In our opinion this contention is without merit. The public prosecutor is exercising a statutory duty under which no obligation is imposed on him to provide reasons in the exercise of such duty (*Joseph Puspam v Menteri Sumber Manusia & Anor* [2001] 4 CLJ 252). To require the public prosecutor to provide reason in the exercise

of his discretionary power, would undoubtedly place upon him an onerous duty not contemplated by the relevant statutes.

**[22]** The allegation by the applicant on the alleged breach of the Rules is unsubstantiated. As we have alluded to earlier, the contents of the SD relied upon is wholly hearsay. Therefore, there is no material which the applicant can rely upon to support the allegation.

**[23]** Before we conclude, it must be emphasised that to disqualify a counsel is a drastic measure which should not be allowed willy-nilly, unless substantiated by cogent and clear evidence. We find this application bereft of any evidence.

**[24]** For all the above reasons, we have reached the unhesitating conclusion that this application is devoid of any merit and should stand dismissed.

*Application dismissed.*

Reported by Kanesh Sundrum